STATE OF MICHIGAN

COURT OF APPEALS

BARBARA ZWIERS,

Plaintiff-Appellant,

v

DR. SEAN GROWNEY and MICHIGAN PAIN CONSULTANTS, P.C.,

Defendants-Appellees.

UNPUBLISHED
June 24, 2014

No. 312133
Kent Circuit Court
LC No. 08-002009-NO

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

RIORDAN, J. (*concurring*)

I concur with the result reached by my colleagues only because we are bound by this Court's conflict panel decision in *Furr v McLeod*, __ Mich App __; __ NW2d __ (Docket No. 310652; issued April 10, 2014). MCR 7.215(J)(6).

In *Furr*, the "conflict concern[ed] whether our Supreme Court's opinion in *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), effectively overruled this Court's opinion in *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009)." *Furr*, __ Mich App at__ (slip op at 1). In *Zwiers*, this Court ruled that the Supreme Court's decision in *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009) no longer required that a trial court dismiss an action that did not strictly comply with MCL 600.2921b(1)'s notice waiting period requirement because the trial court might save the plaintiff's complaint by applying MCL 600.2301. The conflict panel wrote, "[w]e conclude that there is a lack of clarity in the language of *Driver* to the degree that we simply cannot hold, with any level of confidence, that our Supreme Court overruled *Zwiers* or that it implicitly intended to do so." If not for the *Furr* decision, I would affirm the trial court's order granting summary disposition in favor of the defendants.

In *Burton v Reed City Hosp Corp*, 471 Mich 745, 753-754; 691 NW2d 424 (2005), the Supreme Court ruled that a complaint filed before the statutory waiting period expires does not effectively commence an action and, if the statute of limitations elapses in the meantime, dismissal with prejudice is required. Further, in *Driver v Naini*, 490 Mich 239, 257 n 65; 802

NW2d 311 (2011), the Supreme Court wrote that "[w]e decline plaintiff's invitation to depart from well-settled precedent and overrule *Burton*."

By its terms, MCL 600.2301 applies only to "pending" actions.[1] In the instant matter, there is no "pending" action because the plaintiff did not timely file a complaint. *Burton*, *supra*. She filed it in contravention of the 182-day notice and waiting period set forth in MCL 600.2912b(1). Because under the plain language of the statute plaintiff did not commence this action when she filed it, there presently is no pending action before the Court. As such, *Bush v Shabahang*, 484 Mich 156, 161; 772 NW2d 272 (2009) is inapplicable.[2]

If free to do so, I would affirm the trial court's order.

/s/ Michael J. Riordan

[1] MCL 600.2301 provides:

> The court in which any action or proceeding is *pending*, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties. [Emphasis added.]

[2] As the Court noted in *Driver*, 490 Mich at 253, *Bush* analyzed whether a defective yet timely filed NOI could toll the statute of limitations, which was not at issue in *Driver* nor in this case.